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15 UNITED STATES DISTRICT COURT  
16  
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
18  
19 OAKLAND DIVISION

20 EPIC GAMES, INC.,  
21  
22 v.  
23 APPLE INC.,

24 Plaintiff, Counter-  
25 defendant  
26  
27  
28

Defendant,  
Counterclaimant.

Case No. 4:20-cv-05640-YGR-TSH

**DEFENDANT APPLE INC.'S  
ADMINISTRATIVE MOTION TO  
PARTIALLY SEAL PORTIONS OF THE  
PARTIES' TRIAL EXHIBITS AND LIVE  
TRIAL TESTIMONY RELATED THERETO**

1 Pursuant to Federal Rule of Civil Procedure 26(c), Defendant Apple Inc. (“Apple”) files this  
 2 Administrative Motion to Partially Seal Portions of the Parties’ Trial Exhibits and Live Trial Testimony  
 3 Related Thereto. Apple’s final filed Trial Exhibit List was submitted April 25, 2021, *see* Dkt. 481, and  
 4 Apple lodged its exhibits with the Court on April 29, 2021, in accordance with the Court’s pretrial  
 5 order, *see* Dkt. 381. On May 3, 2021 Apple filed a motion to seal potential trial exhibits. *See* Dkt.  
 6 577. On May 7, 2021, the Court denied that motion without prejudice and requested that the parties to  
 7 renew their sealing requests, focusing on those documents ripe for a ruling because of their use in the  
 8 trial proceedings. *See also* Dkt. 643 (Trial Order No. 5). This motion is filed in response to that request  
 9 from the Court. Furthermore, Apple and Epic met and conferred, and Apple has not received any  
 10 objection from Epic regarding Apple’s request for sealing and proposed redactions herein.

11 Apple now requests that the court seal documents which contain information Apple contends  
 12 is sealable under controlling authority and the Local Rules. *See* L. R. 79-5 (defining “sealable”  
 13 “document[s], or portions thereof,” as being “privileged, protectable as a trade secret or otherwise  
 14 entitled to protection under the law”). In particular these documents contain a mixture of either (1) non-  
 15 public, competitively sensitive financial information whose disclosure could harm Apple;  
 16 (2) confidential information whose disclosure could aid a bad actor; (3) competitively sensitive  
 17 business information, including unannounced Apple products or internal market research; and/or  
 18 (4) sensitive business information of Apple’s many third-party developers and other business partners  
 19 which, if revealed, could impact their competitive standing.

20 Apple accordingly moves to seal portions of the parties’ respective trial exhibits containing  
 21 sealable information and live trial testimony directly related thereto. Apple respectfully requests that  
 22 the Court (1) grant Apple’s request to seal the sealable information contained within the exhibits and  
 23 deposition designations discussed herein, (2) temporarily limit public access to the trial proceedings to  
 24 those present live in the courtroom while sealable information is being discussed, and (3) subsequently  
 25 seal portions of the transcript related to sealable information.

26 **LEGAL STANDARD**

27 When a party seeks to seal records for use at trial, there is a “strong presumption in favor of  
 28 access” that can be overcome only by “compelling reasons.” *Kamakana v. City & County of Honolulu*,

1 447 F.3d 1172, 1178 (9th Cir. 2006) (quotation marks omitted). The party seeking to seal the document  
 2 or proceedings must “articulate compelling reasons supported by specific factual findings that outweigh  
 3 the general history of access and the public policies favoring disclosure.” *Id.* at 1178–79 (alteration,  
 4 citation, and quotation marks omitted). “In general, ‘compelling reasons’ sufficient to outweigh the  
 5 public’s interest in disclosure and justify sealing court records exist when such ‘court files might have  
 6 become a vehicle for improper purposes,’ such as the use of records to gratify private spite, promote  
 7 public scandal, circulate libelous statements, or release trade secrets.” *Id.* at 1179 (quoting *Nixon v.*  
 8 *Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)).

9 **DISCUSSION**

10 **A. The Court Should Grant Apple’s Request As To Non-Public Financial Information.**

11 Apple asks the Court to seal specific non-public, competitively sensitive financial information  
 12 whose disclosure could harm Apple. As the Supreme Court has recognized, sealing may be appropriate  
 13 to prevent judicial documents from being used “as sources of business information that might harm a  
 14 litigant’s competitive standing.” *Nixon*, 435 U.S. at 598. Accordingly, courts routinely seal  
 15 information where disclosure could harm a litigant’s competitive standing. *See, e.g., Philips v. Ford*  
 16 *Motor Co.*, No. 14-CV-02989, 2016 WL 7374214, at \*6 (N.D. Cal. Dec. 20, 2016) (concluding that  
 17 “need to avoid competitive disadvantage in contract negotiations and undercutting by competitors is a  
 18 compelling reason that justifies sealing”); *Rodman v. Safeway Inc.*, No. 11-CV-3003, 2014 WL  
 19 12787874, at \*2 (N.D. Cal. Aug. 22, 2014) (granting motion to seal “information discussing Safeway’s  
 20 pricing strategy”).

21 Non-public financial information in particular is routinely sealed because it can reveal sensitive  
 22 information to a litigant’s competitors that would provide those competitors an unfair advantage in the  
 23 future. *See, e.g., Apple Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1225 (Fed. Cir. 2013)  
 24 (applying Ninth Circuit law and concluding that the district court abused its discretion in denying a  
 25 motion to seal as to “profit, cost, and margin data”); *Vigdor v. Super Lucky Casino, Inc.*, No. 16-CV-  
 26 05326, 2018 WL 4510734, at \*2 (N.D. Cal. Sept. 18, 2018) (sealing “business and financial information  
 27 relating to the operations of Defendants”); *Linex Techs., Inc. v. Hewlett-Packard Co.*, No. 13-CV-159,  
 28

1 2014 WL 6901744 (N.D. Cal. Dec. 8, 2014) (concluding that sensitive financial information falls  
 2 within the class of documents that may be filed under seal).

3 The following documents fall within this category for the reasons discussed above, as  
 4 articulated more fully in the concurrently-filed Declaration of Rachel S. Brass: PX-1085; PX-2302;  
 5 PX-2367; PX-2366.

6 In addition, the following deposition designations fall within this category for the reasons  
 7 discussed above, as articulated more fully in the concurrently filed Declaration of Rachel S. Brass:  
 8 Epic's Ex. Depo. 8, Eddy Cue Tr. 94:15-94:17, 94:19-94:22; Epic's Ex. Depo. 9, Matthew Fischer  
 9 Tr. 298:20-298:25; Epic's Ex. Depo. 12, Eric Gray Tr. 79:24-80:3; Epic's Ex. Depo. 19, Mark  
 10 Rollins Tr. 83:12-83:23, 129:10-129:15, 129:22-131:4, 139:5-140:14, 152:24-153:15, 154:15-155:12,  
 11 215:4-216:15, 216:17-217:1, 242:15-242:19, 242:22-243:1, 262:11-262:18, 262:21-263:7.

12 **B. The Court Should Grant Apple's Request As To Information That Could Aid A Bad  
 Actor.**

13 Apple requests that the Court seal specific information that could aid third parties in harming  
 14 Apple or its customers, such as details about Apple's security policies and internal processes like  
 15 Apple's App Review process. Sealing of court records is appropriate "when such 'court files might  
 16 . . . become a vehicle for improper purposes.'" *Kamakana*, 447 F.3d at 1179 (quoting *Nixon*, 435 U.S.  
 17 at 598). For example, courts have sealed information that could be used by a bad actor to breach a  
 18 company's internal security system. *See, e.g., Connor v. Quora, Inc.*, No. 18-CV-07597, 2020 WL  
 19 6700473, at \*2 (N.D. Cal. Nov. 13, 2020) (sealing "information regarding Quora's investigation into  
 20 the data breach incident that could be used by a bad actor to exploit and breach Quora's systems");  
 21 *Music Group Macao Commercial Offshore Limited v. Foote*, No. 14-CV-03078, 2015 WL 3993147,  
 22 at \*5 (N.D. Cal. June 30 2015) ("[C]ourts have found a party's tangible concern about future cyber  
 23 attacks or hacking is a compelling reason to seal materials."); *In re Google Inc. Gmail Litigation*, No.  
 24 13-MD-02430, 2013 WL 5366963, at \*3 (N.D. Cal. Sept. 25, 2013) (finding compelling reasons  
 25 existed to seal "information that if made public . . . could lead to a breach in the security of the Gmail  
 26 system"). Similarly, courts seal information that could be abused by bad actors to harm the parties'  
 27 themselves. *See, e.g., Adtrader, Inc. v. Google LLC*, No. 17-CV-0782, 2020 WL 6387381, at \*2 (N.D.  
 28

1 Cal. Feb. 24, 2020) (sealing information where “disclosing to bad actors who would seek to manipulate  
 2 Google’s systems information about how Google detects and reacts to invalid traffic”).

3 Sealing here is necessary because third parties could use the identified information to evade  
 4 Apple’s important security policies and to manipulate Apple’s App Review process. Apple takes many  
 5 steps, and undertakes substantial efforts, to safeguard information—including its trade secrets and data  
 6 of its customers and developers who use Apple’s technology—and keeping the details of those efforts  
 7 confidential is important to their effectiveness. Public disclosure of this detailed information would  
 8 risk providing assistance to competitors and third parties seeking to unlawfully access or steal data. In  
 9 addition, Apple has designed a rigorous App Review process, using proprietary review tools and  
 10 information, to protect users and developers alike from fraud, malware, and unwarranted intrusion into  
 11 their privacy, as well as to evaluate the operation and reliability of proposed apps and app updates. The  
 12 Court should seal the identified information in order to ensure that bad actors cannot use it to  
 13 circumvent Apple’s important review processes.

14 The following documents fall within this category for the reasons discussed above, as  
 15 articulated more fully in the concurrently-filed Declaration of Rachel S. Brass: PX-0101; PX-2090;  
 16 PX-2174; PX-2350.

17 In addition, the following deposition designations fall within this category for the reasons  
 18 discussed above, as articulated more fully in the concurrently filed Declaration of Rachel S. Brass:  
 19 Epic’s Ex. Depo. 11, Eric Friedman Tr. 129:1-131:13; Epic’s Ex. Depo. 12, Eric Gray Tr. 109:16-  
 20 110:1, 110:2-110:7, 110:9-110:15, 112:18-112:19, 112:21-112:24, 113:2-113:11, 113:12-113:19,  
 21 113:21-114:2, 114:4-114:6, 114:9-114:10; Epic’s Ex. Depo. 13, C.K. Haun Tr. 200:14-201:18,  
 22 202:11-203:18.

23 **C. The Court Should Grant Apple’s Request As To Competitively Sensitive Information.**

24 Apple seeks to seal competitively sensitive information including future-looking product  
 25 information, such as plans to develop yet undisclosed new products. Public access to this information  
 26 would cause Apple economic harm and put it at a competitive disadvantage. *See Ctr. for Auto Safety*  
 27 *v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016); *In re Apple Inc. Device Performance*  
 28 *Litig.*, No. 18-MD-2827, 2019 WL 1767158, \*2 (N.D. Cal. Apr. 22, 2019) (finding compelling reasons

1 may exist to seal “product development plans”); *Algarin v. Maybelline, LLC*, No. 12-CV-3000, 2014  
 2 WL 690410, \*3 (S.D. Cal. Feb. 21, 2014) (compelling reasons found to seal information related to  
 3 product development where “[p]ublic disclosure of L’Oréal’s confidential business material, marketing  
 4 strategies, product development plans could result in improper use by business competitors seeking to  
 5 replicate L’Oréal’s business practices and circumvent the time and resources necessary in developing  
 6 their own practices and strategies”).

7 In addition to future product information, Apple also seeks to seal as competitively sensitive  
 8 certain market research reports which were either commissioned by or conducted by Apple to gain  
 9 unique insights into consumers and gain a competitive advantage. *Samsung*, 727 F.3d at 1228 (finding  
 10 “Apple has a strong interest in keeping its market research reports confidential,” such that compelling  
 11 reasons existed to seal “market research reports [which] contain information that Apple’s competitors  
 12 could not obtain anywhere else”); *Lathrop v. Uber Techs., Inc.*, No. 14-cv-05678-JST, 2016 WL  
 13 9185002, at \*2 (N.D. Cal. Jun. 17, 2016) (“[U]nder Ninth Circuit law . . . internal reports are  
 14 appropriately sealable under the ‘compelling reasons’ standard where that information could be used  
 15 to the company’s competitive disadvantage.”).

16 Sealing is necessary here because public disclosure of this information would risk competitors  
 17 gaining an unfair business advantage by benefiting from Apple’s efforts into product development and  
 18 market research that Apple intended to keep confidential. Apple takes many steps, and undertakes  
 19 substantial efforts, to safeguard information—including its trade secrets—and keeping those efforts  
 20 confidential is important to their effectiveness.

21 The following documents fall within this category for the reasons discussed above, as  
 22 articulated more fully in the concurrently filed Declaration of Rachel S. Brass: DX-4089A; PX-1896;  
 23 PX-1901; PX-2309; PX-2337; PX-2350; PX-2367; PX-2378; PX-2303; PX-2389; PX-2390.

24 **D. The Court Should Grant Apple’s Request As To Information that Reflects Sensitive  
 25 Business Information of Many Third-Party Developers.**

26 Apple also seeks to seal information that reflects sensitive business information of its many  
 27 third-party developers and other business partners which, if revealed, could impact their competitive  
 28 standing. *See Ctr. for Auto Safety*, 809 F.3d at 1097. Although third parties generally are able to assert

1 their own confidentiality interests, in some cases a particular document implicates the information of  
 2 so many third parties that it would be a burden to this Court, the parties, and the third parties to attempt  
 3 to coordinate sealing applications for those exhibits. *See, e.g., Total Recall Technologies v. Luckey*,  
 4 No. C-15-02281-WHA, 2021 WL 1245357, \*1 (Mar. 25, 2021) (finding as legitimate “a request to seal  
 5 a spreadsheet containing the names and addresses of multiple uninvolved third parties”). Thus, Apple  
 6 respectfully requests that the Court exercise its “broad latitude” in sealing matters (*Phillips ex rel.*  
 7 *Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002)) to maintain the sensitive  
 8 information related to these third parties under seal.

9 The following documents fall within this category for the reasons discussed above, as  
 10 articulated more fully in the concurrently filed Declaration of Rachel S. Brass: PX-0191; PX-1922;  
 11 PX-2366.

12 In addition, the following deposition designations fall within this category for the reasons  
 13 discussed above, as articulated more fully in the concurrently filed Declaration of Rachel S. Brass:  
 14 Epic’s Ex. Depo. 12, Eric Gray Tr. 109:16-110:1, 110:2-110:7, 110:9-110:15, 112:18-112:19,  
 15 112:21-112:24, 113:2-113:11, 113:12-113:19, 113:21-114:2, 114:4-114:6, 114:9-114:10.

## 16 CONCLUSION

17 For the foregoing reasons, Apple respectfully requests that the Court partially seal the identified  
 18 information.

19  
 20 Dated: May 21, 2021

21 Respectfully submitted,

22 GIBSON, DUNN & CRUTCHER LLP

23  
 24 By: /s/ Rachel S. Brass  
 25 Rachel S. Brass

26 Attorney for Defendant Apple Inc.